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In the Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE OCHS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner claims that the district court was required under Rule 35 of the Federal Rules of Criminal Procedure to reduce his lawfully imposed sentence of imprisonment and that the district court was required, in considering his motion for reduction of sentence, to order that he receive a psychiatric examination.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on all counts of a seven-count indictment (Pet. App. 17a-22a). Petitioner was charged in count one of the indictment with using extortionate means to collect loans (18 U.S.C. 894); count two charged obstruction of justice by endeavoring to influence witnesses subpoenaed to testify before a grand jury (18 U.S.C. 1503); counts three through five charged that petitioner had filed false income tax returns in which he claimed dependency exemptions for a

nonexistent wife and several nonexistent children (26 U.S.C. 7206(1)); count six charged that he willfully failed to file an income tax return for 1974 (26 U.S.C. 7203); and count seven charged that he willfully attempted to evade his income tax for 1974 (26 U.S.C. 7201). The court imposed consecutive terms of imprisonment of seven years on count one, five years on count two, three years each on counts three through five, and two years on count seven. Thus, petitioner was sentenced to a total of 23 years' imprisonment. The court suspended the imposition of sentence on count six, which it regarded as a lesser included offense encompassed by count seven.[1] The court of appeals affirmed petitioner's conviction (*United States* v. *Ochs*, 595 F. 2d 1247 (2d Cir. 1979)) and specifically held that his sentence was lawfully imposed (*id.* at 1262). The court of appeals observed (*ibid.*): "After serving jail sentences and being

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[1]The trial evidence established (see *United States* v. *Ochs*, 595 F. 2d 1247, 1251 (2d Cir.), cert. denied, 444 U.S. 955 (1979)) that petitioner owned and operated a New York massage parlor and conducted a loan sharking business during the years 1974 through 1976. One of the prostitutes employed at petitioner's massage parlor testified that petitioner had threatened to murder her when she failed to make timely payments on an usurious loan. The evidence also showed that petitioner had failed to file an income tax return for 1974, although he had earned more than $25,000 from his illicit activities during that year and owed approximately $5,939 in income taxes (Pet. App. 22a). During 1974, petitioner opened several savings accounts in the names of other persons, and, during a subsequent grand jury investigation, he instructed these persons, who had been supoenaed as witnesses, not to reveal that they had paid over to him the interest on these accounts. At trial, petitioner stipulated that although he had claimed income tax exemptions for a spouse and dependent children in 1971, 1972, and 1973, there was no record of his having a wife or any children. Friends and business associates also testified that they did not know of petitioner's having a wife or children (595 F. 2d at 1251). Finally, the evidence revealed that petitioner had attempted to bribe the two New York City police officers who arrested him, and that he had sought to induce them to perjure themselves before the grand jury (Pet. App. 30a). Petitioner had also approached several other witnesses and instructed them to testify falsely or to assert their Fifth Amendment privilege against self-incrimination and refuse to testify.

released on parole, [petitioner] * * * repeatedly violated parole by committing new crimes. On the undisputed record disclosed in the pre-sentence report, the judge could reasonably have given Ochs an even higher total sentence than he did." This Court denied certiorari. 444 U.S. 955 (1979).

After this Court denied certiorari, petitioner moved (Pet. App. 2a) for reduction of sentence under Fed. R. Crim. P. 35. Petitioner's motion was based on letters and memoranda (Pet. App. 3a-7a) prepared by federal corrections officers indicating that petitioner had obeyed prison rules, that he had been cooperative, and that he had (in his own words) made a "positive adjustment * * * in prison" during the first two years of his imprisonment (*id.* at 6a). In addition, petitioner sent a hand-written letter to the district court complaining that his previous sentences of imprisonment had been unduly harsh, and that some of the offenses for which he had previously been convicted were no longer regarded as violations of the criminal law (*id.* at 5a). The district court denied petitioner's motion for reduction of sentence (*id.* at 46a), and the court of appeals affirmed (*id.* at 47a-50a).

1. Petitioner's principal contention (Pet. 13-15) is that the district court violated his due process rights by failing to order a psychiatric evaluation in connection with his motion for reduction of sentence because the court considered certain 12 year old psychiatric reports that showed an antisocial and amoral disposition (Pet. App. 25a-26a), and because of the absence of any recent materials that allegedly would have shown that his condition had improved (*id.* at 14a-16a, 45a).[2] That contention lacks merit. Although peti-

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[2]Similarly, petitioner contends (Pet. 20) that the district court was required to afford him a hearing on his motion for reduction of sentence. But the court of appeals correctly held (Pet. App. 49a) that the

tioner asked the district court to "obtain official copies of relevant materials from his prison record in Atlanta" (*id.* at 48a), he never asked the court to order the preparation of any report not already contained in his prison file. The court of appeals therefore correctly rejected (*id.* at 49a) petitioner's due process argument on the ground that petitioner had never asked the district court to order a psychiatric examination. In the absence of any such request, the district court cannot be faulted for failing to order a psychiatric examination.

2. Petitioner also contends (Pet. 26) that the district court was required "as a matter of law" to reduce his sentence because he showed that he had behaved well during the first two years of his current term of imprisonment. That contention also lacks merit. Petitioner's sentence was within statutory limits and, as the court of appeals observed on direct appeal, "[o]n the undisputed record disclosed in the pre-sentence report, the [district] judge could reasonably have given [petitioner] an even higher total sentence than he did" (595 F. 2d at 1262). Motions for reduction of a lawfully imposed sentence "constitute pleas for leniency," and the denial of such relief will be disturbed only upon a showing of "a gross abuse of discretion" by the district court. *United States* v. *Cumbie*, 569 F. 2d 273, 274 (5th Cir. 1978). Accord, *Government of the Virgin Islands* v. *Gereau*, 603 F. 2d 438, 443 (3d Cir. 1979); *United States* v. *Galoob*, 573 F. 2d 1167, 1170 (10th Cir. 1978); *Lee* v. *United States*, 501 F. 2d 494, 501 (8th Cir. 1974); *United States* v. *Ellenbogen*, 390 F. 2d 537, 543 (2d Cir.), cert. denied, 393 U.S. 918 (1968).

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district court did not abuse its discretion in deciding petitioner's motion without such a hearing. Accord, *United States* v. *Slutsky*, 514 F. 2d 1222, 1226 (2d Cir. 1975).

Petitioner presented evidence to the district court that his conduct during his two years in prison had been good, but the district court, quite reasonably, also considered petitioner's long history of criminal convictions and violations of parole, as well as the number and seriousness of the offenses for which he is currently incarcerated (Pet. App. 22a-30a). The district court reasonably concluded that petitioner's criminal record was entitled to more weight than was the evidence of his recent cooperative attitude in prison, and the court did not abuse its discretion when it denied his motion. See, *e.g.*, *United States* v. *Jones*, 444 F. 2d 89, 90 (2d Cir. 1971).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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